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No. 84-2004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CALVIN M. PRICE,

Petitioners,

v.

MISSOURI STATE HIGHWAY PATROL and ALAN S. WHITMER, Superintendent, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the appellate court's reference to public safety in its discussion of the *Tamiami* test, is in conflict with applicable authority when the appellate court limited its discussion of safety to that provided for in the *Tamiami* test?

2. Whether the appellate court's decision to reverse the district court on "clearly erroneous" grounds conflicts with any applicable authority?

3. Whether the appellate court's brief reference *in dicta* to federal retirement ages conflicts with *Johnson* v. *Mayor and City Council of Baltimore,* ____U.S.____, (Nos. 84-518 and 84-710 (June 17, 1985), when the court had already determined that the Patrol's mandatory retirement age was a bona fide occupational qualification under the *Tamiami* test?

4. Whether the appellate court failed to consider each rank of the Patrol in its analysis of whether the Patrol's mandatory retirement age is a bona fide occupational qualification?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondent, Missouri State Highway Patrol, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 748 F.2d 447 (8th Cir. 1984), and it reversed the judgment and opinion of the United States District Court for the Western District of Missouri, at 555 F.Supp. 97 (W.D. Mo. 1982). Both Calvin Price and the Equal Employment Opportunity Commission have petitioned for writ of certiorari. Respondent consolidates its response to both in this brief.

STATEMENT OF THE CASE

This is a case brought by Lt. Calvin Price of the Missouri Highway Patrol, consolidated with the suit brought by the Equal Employment Opportunity Commission (EEOC), challenging the respondent's policy of mandatorily retiring all patrolmen at age 60.[1] The Patrol asserted that the mandatory retirement age of 60 is a bona fide occupational qualification for all ranks under the Age Discrimination in Employment Act, 29 U.S.C. sections 621-634 (hereafter ADEA). The Patrol also asserted that under the bona fide occupational qualification test set forth in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-36 (5th Cir. 1976), recently adopted by this court in *Western Air Lines, Inc.* v. *Criswell*, ____U.S.____, (No. 83-1545, June 17, 1985), respondent's mandatory retirement age satisfies both prongs of the *Tamiami* test, and the Eighth Circuit so found.

Respondent asserts that the majority opinion of the Eighth Circuit aptly describes the duties of the Patrol. That opinion sets forth the duties as follows:

The Patrol's main functions are to enforce the traffic laws and to maintain safety on the highway. The Patrol also does criminal work including investigations of burglaries, murders, and other crimes. Patrolmen and corporals spend the most time working the roads and conducting investigations. Higher ranking Patrol members often travel on the road as part of their normal duties or coming to and from work.[2] The Patrol members' obligation to the

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[1] This policy was codified in June 1982, in section 104.080, RSMo Supp. 1984.

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[2] Patrol members' entering rank is that of patrolman or trooper. The upward line of progression in rank is patrolman (or trooper), corporal, sergeant, lieutenant, captain, major, lieutenant colonel, and colonel. Colonel Hoffman, the Superintendent of the Patrol, testified that there are Patrol members over the age of fifty-five in every rank.

public extends to their off-duty hours. At all times, they are expected to enforce the traffic laws and to act when a felony is committed in their presence, when someone's life is in danger, when property is threatened, and when they receive information requiring Patrol attention. All ranks, including those which are primarily administrative, participate in special assignments. For example, the Patrol steps up its policing of the highways on holiday weekends, and the participation of senior officers is required. Other special assignments include riot control, civil disturbances, natural disasters, manhunts for escaped convicts, football game details, and covering important meetings.

A member of the Patrol engages in physically and emotionally strenuous activities. His duties may involve handling verbal and physical resistance from suspects such as violent drunks or fleeing suspects. Apprehending a speeder or a drunk driver may necessitate a chase, during which the Patrol member must drive at high speeds, weave through highway traffic, and call the radio dispatcher. For instance, when Lieutenant Mills, a desk officer, was returning home from work one day, he chased a speeding motorist. After the motorist fled from his car, Mills chased him on foot. When the motorist turned on Mills and pointed a revolver at him, Mills shot and killed the motorist.

If the Patrol member is called to an accident scene, he determines what assistance is needed, such as the immediate removal of victims from cars, applies first aid to victims, and secures the scene from further damage. Patrol members also have the sad duty of informing relatives of the seriously injured or dead. Members of all ranks recounted instances in which they assisted motorists whose vehicles were mechanically disabled or stuck in the snow. To prevent further accidents, Patrol members push cars off the road and remove hazardous objects, such as dead animals, hay bales, tires, and accident debris from the road.

The Patrol's obligations to the public mean that Patrol members of all ranks work the road, handle abusive and violent motorists, engage in high speed chases, assist motorists, and participate in other strenuous field work. Although a Patrol member may call for assistance, emergency situations do not always accord him the luxury of waiting for help.

The Eighth Circuit found that the Patrol's evidence satisfied both prongs of the *Tamiami* test, and that the lower court clearly erred in holding against the Patrol. Though the lower court did not even mention the first prong of the *Tamiami* test, the Eighth Circuit held that the Patrols' evidence established that the mandatory retirement age was reasonably necessary to the essence of the Patrol, safety. In discussing the second prong of the *Tamiami* test, the court held that the Patrol met both alternatives of the test in establishing that all or substantially all persons over 60 would be unable to perform the job safely and efficiently, *and* that there is no practical way to distinguish which persons over 60 can perform the job.

In reviewing the medical evidence presented by both sides, the court noted that the Patrol presented testimony of Drs. Alexander Lind, Albert Antlitz, and David Westhoff. Dr. Lind testified to the effects of age on a person's aerobic capacity. Aerobic capacity depends on the efficiency of the individual's lungs and cardiovascular systems. Dr. Lind testified that aerobic capacity, or the ability to utilize oxygen, is essential whenever a Patrol member engages in physical activity such as chasing a suspect, because without sufficient aerobic capacity, the muscles cannot work without fatique. Dr. Lind testified that only ten percent of Patrol members over 60 can reach the aerobic capacity level necessary to perform the duties of the Patrol, based on numerous studies, and his own research as to the levels necessary to perform public safety occupations.

Several retired Patrol members testified that when they had retired at age 60 or before they could no longer work the long hours, engage in high speed chases, or handle drunks they encountered on the road. Nor could they face another winter with its attendant accidents and hazardous roads. The court noted that this testimony supported Dr. Lind's conclusion.

The Patrol also presented the testimony of Dr. Antlitz, an expert cardiologist who has performed numerous studies on the cardiological effects of age on law enforcement officers. Dr. Antlitz testified, and even petitioner's evidence supported, the fact that all other factors being equal, the "sixties" age group is *five times* as likely to have coronary heart disease as the "thirties" age group. This disease presents the danger that, in times of stress, such as sudden exertion in cold weather or during a confrontation, the Patrol member's adrenaline response may push him in to total body collapse from fatigue or may cause a heart attack.

Dr. Antlitz also testified that there is no single test or battery of tests that safely measure a Patrol member's ability to perform his duties for many reasons. First, testing an asymptomatic population such as the Patrol will yield as many false positives of cardiac disease as false negatives. Second, laboratory tests cannot recreate the unpredictable, stressful, sometimes life-threatening situations in which the Patrol members work. Third, both patient and physician can affect the results of tests such as the treadmill or stress test. The patient may, for a short period, exercise or "prepare" for the test, thereby skewing the results. Or the patient may be suffering from some disease other than heart disease which can affect the results. The physician must then make a subjective determination in evaluating the patient's performance and interpreting the numerical results of these tests.

Dr. Westhoff, the internal medicine specialist who administers physical exams for the Patrol's recruits, testified that on at least two occasions in his office, a complete battery of cardiological tests, including treadmill tests, were given to individuals who received scores indicating they were "normal", yet they had heart attacks within a day of their tests. These were the same tests that plaintiff's expert, Dr. Mohler, testified could tell the Patrol everything they need to know to predict a member's performance.

The Eighth Circuit then proceeded to discuss some examples in which the record itself revealed that the lower court simply misstated the evidence in this case. The lower court, for example, stated that Dr. Lind testified that an average 45 year old male could not perform the duties of the Patrol. The transcript revealed however, that Dr. Lind actually testified that at least fifty percent of the age 45-50 sedentary population group can perform at the desired aerobic capacity. The other half can perform but must utilize the emergency muscular function which induces rapid fatigue.

The Eighth Circuit also noted that the district court erred in its statement that the risk of cardiological disease "is minimal and is present for members of the Patrol whose ages are in their 30's. The risk peaks for those who are in their 50's at a rate of one percent." 555 F.Supp at 104. Dr. Antlitz's actual testimony was that the risk of heart disease is *five times* greater for 60 year olds than 30 year olds (T. 613). Even Dr. Mohler, the plaintiff's expert, reluctantly admitted the risk of heart disease increases five times between age 30 and 60 (T. 887-888, 937-938).

The Eighth Circuit also noted that the lower court was apparently trying to wander from the *Tamiami* standard with its heavy emphasis on how older Patrol members *could* perform if only "remade" as the district court sees fit with

a variety of exercise programs the lower court was impressed with. However, as the Eighth Circuit emphasized, the *Tamiami* test does *not* ask if all or substantially all patrolmen over 60 *could* perform their duties if they were "remade" into ideal physical specimens. It only asks if all or substantially all of them, *taken as they are,* are able to perform their duties. The appellate court held that the lower court clearly did not follow the *Tamiami* test by delving into the subjective motivations of why the Patrol does not "exercise" its members as the lower court sees fit, or attempting to subjectively judge what the Patrol *could* be, if it did. As the Eighth Circuit opined, the ADEA does not require such a draconian approach in determining whether the mandatory retirement age is a bona fide occupational qualification.

The lower court credited the EEOC's expert witness, Dr. Stanley Mohler, an aerospace medicine specialist. Dr. Mohler told the lower court that commercial pilots, as well as highway patrolmen, should be allowed to work through their nineties; that 90 year olds should be admitted as *entering cadets* into the Patrol; that senility is caused by a virus; 80% "of the people" never get senility; and that there is *no* relationship between age and deterioration of hearing, distance vision, strength, coordination, endurance, adaptability to temperature changes, aerobic capacity, obesity, cardiovascular response, tolerance of stress, fatigue threshold, high blood pressure, impairing disease and cardiovascular disease.

Dr. Mohler also testified he can predict with a probability of .017 that in the next five years an individual will not have a cardiovascular heart event by doing a risk factor analysis and combining it with a treadmill test. However, as the Eighth Circuit pointed out, he failed to tie this baffling 5-year guarantee into any prediction as to what this would mean to patrolmen, specifically. His guarantee did

not forecast the likelihood of a patrolman suffering a cardiac event when he encounters the stressful situations a patrolman encounters. Instead, the Eighth Circuit, emphasized, Dr. Mohler told us by passing his test you are merely ordained in Dr. Mohler's words, an "essentially normal person".

The lower court found that the Patrol's mandatory retirement age of 60 was not a bona fide occupational qualification under the ADEA, and the Patrol appealed to the Eighth Circuit, which reversed the lower court on this issue.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The court of appeals' discussion of the "safety factor" as it is considered under the Tamiami test, is not in conflict with the applicable authority of this or any other federal court, but rather follows well established precedent of this court.

Petitioners argue that because the Eighth Circuit mentioned the words "public safety" in a paragraph that also discusses medical evidence that somehow this evinces an intent to "relax" the standard of the *Tamiami* test. At the outset, it is important to remember that the second prong of the *Tamiami* test *itself,* speaks in terms of the issue of safety. It holds that an employer satisfies the second prong of the *Tamiami* test if it shows that all or substantially all of the older employees are unable to perform their duties *safely* and efficiently or that some older employees possess traits precluding *safe* and efficient job performance unascertainable other than through knowledge of the employee's age. *Usery* v. *Tamiami Trail Tours, Inc.,* 531 F.2d 224, 235 (5th Cir. 1976). Thus, the ability of the Patrol members to perform their duties, namely protecting the public, in a safe manner is a key element of this "second prong" that *must* be determined by the Court.

Moreover, it is clear that the statement of the Eighth Circuit that petitioners challenge is merely a "summing up" of *both* prongs of the Tamiami test. The full text of that statement reads:

> In light of the fact that public safety and lives depend upon the capabilities of Patrol members, and in light of the overwhelming evidence of declining physical ability and increasing coronary risk among persons who have reached the age of sixty, we hold that the Patrol clearly has justified *its mandatory retirement age.*

[Emphasis added.] *Id.* at 455. Note that the court did *not* conclude this statement by holding that the Patrol only satisfied the second prong of the *Tamiami* test, but that the Patrol had justified the mandatory retirement age. Clearly the court was not discussing the second prong of the *Tamiami* test *alone,* but was referring to the public safety aspect of the first prong, and the medical evidence aspect of the second prong, in reaching the conclusion that the Patrol had justified the mandatory retirement age in its entirety. This analysis, of course, virtually tracks the *Tamiami* test as adopted by this court in *Western Air Lines* v. *Criswell,* No. 83-1545 (June 17, 1985).

The Eighth Circuit is well aware that the public safety factor only affects the burden of proof on the first prong of the *Tamiami* test, and emphasized this in its discussion of the first prong. *Id.* at 450. Its strict adherence to the *Tamiami* test is indisputable. In fact, it has steadfastly applied the *Tamiami* test since 1977 in *Houghton* v. *McDonnell Douglas Corporation,* 553 F.2d 561 (8th Cir. 1977).

Petitioners also appear to argue in the fifth paragraph under their first point that the Eighth Circuit "relaxed" the burden of proof on the *first* prong of the *Tamiami* test. The statement of the Eighth Circuit attacked by petitioners in this instance obviously concludes the Eighth Circuit's discussion of the first prong, and precedes any discussion of the second prong. *Id.* at 451. In this discussion the Eighth Circuit again adhered to the *Tamiami* standard by finding that the Patrol's retirement age was reasonably necessary to the performance of its functions. At no time did the Eighth Circuit deviate from *Tamiami,* and would not even *consider the* Patrol's secondary alternative argument that they should abandon the *Tamiami* test.

Petitioners can simply cite to *no* evidence that the Eighth Circuit "relaxed" the burden of proof as set forth in *Tamiami.* Even a brief perusal of their argument reveals

that their argument consists only of contrived, semantic word games. The Eighth Circuit applied precisely the same *Tamiami* standard in this case that this court adopted one month ago in *Western Air Lines* v. *Criswell, supra.*

II.

There is no basis for this court to grant the petition for Writ of Certiorari for the purpose of reviewing the appellate court's decision on petitioner's theory that the court conducted a de novo **review of the facts, because the court of appeals correctly applid the "clearly erroneous" standard.**

The Eighth Circuit's reversal of the lower court rests squarely on the standard set forth in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); namely, that the lower court's finding may be reversed as clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made.

There is no question but that the appellate court is entitled to conduct its own review of the evidence in this case. In fact, this court recently found, in discussing Rule 52(a), the "clearly erroneous" rule, that Rule 52(a) has never forbidden the *independent* examination of the *entire* record by the appellate court, and noted that even the *Gypsum* court emphasized that the reviewing court must look at the *entire evidence* in arriving at its definite and firm conviction that a mistake has been committed. *Bose Corporation* v. *Consumers Union of United States, Inc.*, ___U.S.___, 104 S.Ct. 1949, 1959 (1984).

When the Eighth Circuit independently examined the entire lower court record, they found that the lower court had based its decision on the following:

1. *Outright mischaracterization of the facts in the record.* As aforementioned in the statement of the case, the

record reveals that the lower court either deliberately or mistakenly mischaracterized several key facts presented in this case. For example, the lower court mischaracterized the testimony of the Patrol's expert physiologist when it stated that Dr. Lind testified that an average 45 year old male could not perform the duties of the Patrol. The record shows that Dr. Lind actually testified that half of the 45 year olds could perform Patrol duties, and the other half could also perform but by using the emergency muscular reserve and tiring quickly. As another example, the lower court blatantly misstated the testimony of the Patrol's cardiologist, Dr. Antlitz, when it stated that the risk of heart diseases increased at a "rate of one percent" from the thirties age group to the fifties. Dr. Antlitz actually testified that the risk of heart disease for 60 year olds is *five* times greater than that of 30 year olds. Even petitioner's expert witness, Dr. Mohler, reluctantly admitted this on cross-examination. The lower court actually substituted its own finding in place of the evidence on the record. It is worth emphasizing that no credibility choices are involved when the appellate court finds that the lower court has totally mischaracterized the evidence on record. A more sterling example of a "clear error" cannot be found.

2. *Distortion of the Tamiami standard.* The Eighth Circuit also found that the lower court distorted the *Tamiami* standard by heavily emphasizing the lack of physical fitness programs for the Patrol, and attempting to subjectively apply the *Tamiami* standards to a 60 year old force of ideal physical specimens, rather than 60 year old Patrol members *taken as they are.* The Eighth Circuit held:

> The District Court's digression into this subject reflects concern with the subjective motivations for the Patrol's policies. The *Tamiami* test, however, focuses on objective evidence, in support of the BFOQ.

> The test also does not evaluate the age restrictions in terms of an ideal employee. It simply requires objective evidence on whether the older employees can perform their duties or on whether there is a practical way to differentiate among employees other than age. As the Patrol suggests, "[t]he district court . . . appears to base its decision invalidating the bfoq, on what it considers a 60 year old patrolman *could* be, if only 'remade' as the District Court sees fit.
> Reply Brief for Patrol at 2. The ADEA does not require so draconian an approach."

The Eighth Circuit cannot be expected to overlook such an obvious attempt to depart from the *Tamiami* objective standard and replace it with the lower court's version of a subjective standard, unsupported by any authority. In fact, the Eighth Circuit is not even bound by the "clearly erroneous" standard when it has found that the lower court erred by altering a legal standard. As another appellate court recently held:

> However, it is well settled that the clearly erroneous limitation does not apply to the review of a district court's legal conclusions and inferences drawn from the facts, and that the appellate court is free to make an independent determination from the same facts of the determinative legal conclusions and inferences.

United States v. *Grayson County State Bank*, 656 F.2d 1070, 1075 (5th Cir. 1981), *cert. den'd.*, 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 46, citing *United States* v. *Mississippi Valley Generating Company*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268 (1961).

The lower court's tampering with the *Tamiami* standard *alone*, justifies the Eighth Circuit's reversal.

3. *Petitioner's experts.* The Eighth Circuit could not ignore the strange and bizarre opinions offered by petitioner's medical expect, Dr. Mohler, the self-professed

aerospace physician who offered a variety of opinions in this case. Dr. Mohler testified on the stand that 90 year olds should not only be *kept* on the Patrol, but that 90 year olds should be accepted as entering cadets in the Patrol. Always somewhat of a champion of the rights of 90 year olds, Dr. Mohler also expressed outrage that the FAA forbids 90 year olds from flying commercial planes. Dr. Mohler opined that senility is caused by a virus; 80% "of the people" never get senility; and that there is *no* relationship between age and deterioration of hearing, distance vision, strength, coordination, endurance, adaptability to temperature changes, aerobic capacity, obesity, cardiovascular response, tolerance of stress, fatigue threshold, high blood pressure, impairing disease and cardiovascular disease. Dr. Mohler also offered a five-year guarantee against heart attack to any "essentially normal person" who passed his tests. It had only been a two-year guarantee seven months earlier, when he had testified in *Hoefelman* v. *Conservation Commission of the Missouri Department of Conservation*, 541 F.Supp. 272, 274, fn. 1, (W.D. Mo. 1982).

The Eighth Circuit emphasized that even Dr. Mohler, however, failed to testify that this test could predict *anything* as to what would happen to *Patrol* members when they confronted the innumerable stressful situations that arise in their work. The *Tamiami* test specifically requires a determination as to the accuracy of testing individuals who perform Patrol duties; not just "essentially normal persons".

Respondents have already set out the thorough, well reasoned opinions of the Patrol's experts in the statement of the case. There is really no question that the lower court clearly erred in crediting Dr. Mohler's opinions.

Obviously the lower court clearly erred in mischaracterizing key evidence on the record, substituting a subjective standard for the proper objective *Tamiami* standard,

and crediting Dr. Mohler's testimony. Nothing in this court's recent *Anderson* v. *City of Bessemer City*, ____U.S.____, 105 S.Ct. 1504 (1985), decision conflicts with the result of the Eighth Circuit in reversing the lower court. For even on the limited question of credibility of witnesses, this court held in *Anderson*:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, *e.g.*, *United States* v. *United States Gypsum Co.*, *supra*, 333 U.S., at 396, 68 S.Ct., at 542.

Id. at 1512, 1513.

Petitioners submit that this is simply a case in which the lower court based its decision on complete mischaracterizations of the record, a distorted legal standard, and the testimony of Dr. Mohler, whose crusade for 90 year old commercial pilots and Patrol members, together with his bogus five-year "guarantee" against heart attack surely places his testimony in the category of "so internally inconsistent or implausible on its face", that under any authority, the Court of Appeals correctly found that the lower court clearly erred. *Id.*

III.

This court should refuse to grant the petitioner's request for certiorari on the question of the effect of the fed-

eral retirement statute because the appellate court had already determined that the patrol's mandatory retirement age was a bona fide occupational qualification under the Tamiami **test, before it even mentioned the federal statute** in dicta, **and thus did not rely on the federal retirement age statute to reach its decision.**

This court's recent holding in *Johnson* v. *Mayor and City Council of Baltimore*, ____U.S.____ Nos. 84-518 and 84-710 (June 17, 1985), in no way conflicts with the Eighth Circuit's holding. As aforementioned, the Eighth Circuit's holding that the Patrol's mandatory retirement age was a bona fide occupational qualification rested squarely on the *Tamiami* test, recently adopted by this court. *Western Air Lines* v. *Criswell*, No. 83-1545 (June 17, 1985). Following seven pages of discussion on this test, and its conclusion that the Patrol's mandatory retirement was a bona fide occupational qualification under the *Tamiami* test, the court merely noted in one paragraph of dicta that federal law enforcement officers are retired at 55 which is also persuasive on this issue.

This hardly compares to the *Johnson* case, in which the Fourth Circuit held that a federal retirement age of 55 for firefighters established *as a matter of law* that a state firefighter's retirement age of 55 is a bona fide occupational qualification under the ADEA. The Patrol never even argued this. The Eighth Circuit certainly did not hold that the federal law enforcement retirement statute established the Patrol's retirement age as a bona fide occupational qualification. It only followed the strict language of the *Tamiami* test in finding that the Patrol's retirement is a bona fide occupational qualification under the ADEA. And petitioner's contention that the Eighth Circuit somehow "relaxed" the standard because of this federal statute is not only without support in the record, but without sup-

port in petitioner's brief, for they cite no evidence to support this novel theory.

IV.

Certiorari should not be granted on the question of whether the appellate court should have analyzed each rank of the patrol in its bona fide occupational qualification analysis, because, in fact, the appellate court did consider every rank of the patrol in its bona fide occupational qualification determination.

Petitioners correctly note that the Eighth Circuit, in *EEOC* v. *City of St. Paul,* 671 F.2d 1162 (8th Cir. 1982), held that in determining whether a mandatory retirement age is a bona fide occupational qualification, an inquiry must be made as to each occupation affected, as opposed to the business as a whole. And though this court has never reached this issue, respondents have never disputed this point. Petitioners now argue that the Eighth Circuit did not consider each "occupation" or rank of the Patrol, contrary to their earlier decision, and advance this as a reason for this court to grant certiorari.

The Patrol, of course, presented evidence on the duties of every rank of the Patrol in support of its assertion that the mandatory retirement age is a bona fide occupational qualification for every rank of the Patrol. The appellate court clearly considered each rank's duties in its *Tamiami* analysis of the evidence. The Eighth Circuit first noted that there are Patrol members 55 years and older in every rank of the Patrol. It found that though patrolmen and corporals spend the most time working the road, that *all* ranks travel the road as part of their normal duties or coming to and from work, and that anytime they are in their car, they are under orders to enforce the traffic laws,

act when a felony is committed in their presence, and protect lives and property when they are endangered. This evidence was unrefuted. *All* ranks are also under orders to patrol the roads on holiday weekends. Thus, all members must be prepared to confront a number of physically and emotionally strenuous activities, including rescuing and rendering first aid to accident victims, pushing cars off the road, engaging in high speed chases, handling abusive or violent motorists, and wrestling with apprehended drunk drivers. Moreover, when these Patrol members drive, they drive alone, and they must be prepared to confront all of the above emergencies *alone*.

Petitioners again fail to demonstrate, in light of the unrefuted evidence of the duties of *every* rank of the Patrol, that the Eighth Circuit in any way failed to consider every rank in its decision that the mandatory retirement age is a bona fide occupational qualification for *all* ranks of the Patrol.

CONCLUSION

Petitioners have failed to demonstrate that this case presents any questions which justify full, plenary review by this court. The Eighth Circuit strictly applied the *Tamiami* test to the instant case, and petitioners dispute the application and result. This court has itself adopted the *Tamiami* test. There is simply no conflict among authorities on this issue such to justify a full review by this court.

For these reasons the petition for certiorari should be denied.

Respectfully submited,

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